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## Order on Defendants' Motion for Summary Judgment (E.K. GREENWALD)

Elizabeth E. Long  
*Superior Court of Fulton County*

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IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA



E.K. GREENWALD, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
STEVEN A. ODOM, MARTIN KIDDER, )  
AND MARK DUNAWAY, )  
 )  
Defendants. )  
\_\_\_\_\_ )

CIVIL ACTION FILE NO. 2008-CV-154834

**ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

On January 19, 2011, counsel appeared before this Court to present oral argument on Defendants' Motion for Summary Judgment. After hearing the arguments made by counsel, and reviewing the briefs submitted on the motion and the record in the case, the Court finds as follows:

**Facts:**

Mr. E.K. Greenwald ("Greenwald") sued Mr. Steven A. Odom ("Odom"), Mr. Martin Kidder ("Kidder") and Mr. Mark Dunaway ("Dunaway") for alleged misrepresentations in connection with his purchase for \$2,040,000 through a private subscription (the "Transaction") of 3,000,000 shares (and 2.25 million warrants to purchase additional shares) in Verso Technologies, Inc. ("Verso"), a Minnesota telecommunications corporation that filed for bankruptcy protection on April 28, 2008.

Odom was Verso's CEO, Kidder was Verso's CFO, and Dunaway was Verso's COO. The record shows that Greenwald was a retired professor, with a Ph.D in engineering physics. He was an experienced investor, familiar with the telecommunications industry, and at the time of the Transaction, Greenwald already owned 165,000 shares of Verso stock through earlier

purchases on the open market. Prior to the Transaction, Kidder furnished Greenwald with a Confidential Information Memorandum, a Subscription Agreement, and an Investor Questionnaire (collectively, the "Offering Documents"). On or about August 20, 2007, Greenwald met with Odom and Dunaway to discuss the pending Transaction and Verso's business prospects. On September 5, 2007, Greenwald executed an acknowledgment of the terms of the Offering Documents.

Greenwald asserts claims for common law fraud, negligent misrepresentation, and securities fraud under Georgia law. Specifically, Greenwald alleges that Odom and Dunaway made oral misrepresentations during the meetings on August 20, 2007, and that the Offering Documents failed to adequately disclose material information.

**Standard:**

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991). The moving party need only eliminate one essential element of a party's claim to prevail on summary judgment. Real Estate Int'l Inc. v. Buggay, 220 Ga. App. 449, 451 (1996).

Under Georgia law, "fraud has five elements: (1) false representation by a defendant; (2) scienter; (3) intention to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff." Bogle v. Bragg, 248 Ga. App. 632, 634 (2001). Negligent misrepresentation has three elements: "(1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc. 267 Ga. 424, 426 (1997). A

claim for securities fraud under Georgia law has five elements: “1) a misstatement or omission, 2) of a material fact, 3) made with scienter, 4) on which plaintiff relied, 5) that proximately caused his injury.” Keogler v. Krasnoff, 268 Ga. App. 250, 254 (2004). Thus, reliance is an element common to all of Greenwald’s claims.

**Oral Misrepresentations of Odom and Dunaway:**

Greenwald concedes that Kidder made no misrepresentation that induced him to enter into the Transaction. Thus, the only alleged oral misrepresentations at issue concern statements made by Dunaway and Odom during meetings held on August 20, 2007. During those meetings, Greenwald contends that Dunaway and Odom made certain representations about Verso’s projected sales revenue and future financial condition. Specifically, Greenwald alleges that Dunaway represented that Verso’s 2008 revenue would exceed \$75 million, based on contracts or orders “in hand,” and that fourth quarter 2007 revenue of \$15,000,000 was “all but a done deal.” According to Greenwald, Odom also stated that fourth quarter 2007 would be EBITDA neutral or positive and that Verso would be EBITDA positive all through 2008. As it turns out, these financial projections fell short, and Verso filed for bankruptcy on April 28, 2008. Greenwald also attributes to Odom representations that Verso would sell its NetPerformer division in the fourth quarter of 2007 and that Verso was not considering any further acquisitions. In fact, Verso ultimately acquired a company in the fourth quarter of 2007, instead of selling NetPerformer.

The Court finds that these statements about Verso’s projected revenue and future plans to sell or acquire assets cannot provide a basis for Greenwald’s claims because they are representations as to future events. “A misrepresentation presupposes knowledge of the falsity of the representation and does not include representations as to future acts or events.” Gross v. Ideal Pool Corp., 181 Ga. App. 483, 485 (1987). Even if the Court were persuaded by

Greenwald's argument that Dunaway's and Odom's statements also contained misleading information about current events, Greenwald's reliance on such statements is negated by the merger clause contained in the Subscription Agreement, as more particularly set forth below.

The only alleged misrepresentation that did not involve a future business prospect or financial projection was Odom's statement, in response to a question from Greenwald about the status of Verso's current debt, that "there was nothing but the normal, daily, operational type debts" in addition to certain known secured debt facilities. According to Greenwald, Verso held past due trade payables that were not identified as past due amounts. The record, however, shows that Verso's annual report disclosed that it had \$11 million in payables owed before the end of 2007 and almost \$21 million in debt payable by the end of 2009. Moreover, the risk factors provide that as of "June 30, 2007, [Verso] had an accumulated deficit of approximately \$361.2 million" and that Verso's "operations...are dependent on the Company's ability to secure additional financing; and...there are no existing arrangements with respect to that financing." There is no dispute that Greenwald was aware that Verso struggled financially in the past, was presently short on cash, and that his investment would be used to address cash-flow problems at Verso. Considering the full context of the information made available to Greenwald prior to his investment, the Court finds that Greenwald had the opportunity to appreciate the true nature of the risk of the Transaction and cannot show that he was misled to such an extent that it masked the disclosed risks.

**The Merger Clause:**

Even if Greenwald could show that Dunaway's and Odom's statements amounted to material misrepresentations, the Court finds that Greenwald cannot overcome the merger clause in the Subscription Agreement, which expressly forecloses Greenwald's right to rely on representations made outside the Offering Documents. The merger clause provides that "[t]his

Subscription Agreement contains the entire agreement of the parties with respect to the matter set forth herein and there are no representations, covenants or other agreements except as stated or referred to herein or as embodied in the Offering Documents.”

The Georgia Supreme Court has clearly directed that “in an arm’s length business transaction, pre-contractual representations are superceded by a valid contractual merger clause.” First Data POS, Inc. v. Willis, 273 Ga. 792, 792 (2001). The Court goes on to explain the important effect of a merger clause: “a person who has received written disclosure of the truth may not claim to rely on contrary oral falsehoods.” Id., 273 Ga. at 795.

The Offering Documents contain over nine pages of risks associated with the Transaction, including the disclosure that Verso’s “revenues may decline significantly if any major partner cancels or delays a purchase of our products,” Verso’s “business strategy calls for growth internally as well as through acquisitions,” Verso has “a history of net losses, including net losses of approximately \$6.5 million for the quarter ended June 30, 2007, \$17.8 million for the 2006 fiscal year, \$20.1 million for the 2005 fiscal year.... As of June 30, 2007, we had an accumulated deficit of approximately \$361.2 million,” and Verso “may not be profitable in the future.” Accordingly, the Court finds that Greenwald was well apprised of the risks that form the substance of his complaints. To the extent that Greenwald is relying on oral statements to contradict the terms of the Offering Documents, the merger clause reflects the parties’ intention that the Offering Documents supercede all pre-contractual representations concerning the Transaction, and the parol evidence rule prohibits the consideration of prior contradictory oral statements. First Data POS, Inc., 273 Ga. at 794.

Greenwald seeks to overcome the operation of the merger clause by pointing to language in another provision of the Subscription Agreement that he contends permits the integration of

Dunaway's and Odom's oral statements into the parties' agreement. The "reliance" clause in the Subscription Agreement provides that:

The Company has made available to the Subscriber the opportunity to ask questions of, and receive answers from the Company with respect to the activities of the Company as described in the Offering Documents, and otherwise to obtain any additional information... necessary to verify the accuracy of the information contained in the Offering Documents.

Considering that the reliance clause expressly limits the solicitation of outside information to the substance of the Offering Documents, the Court is not persuaded that this language can be construed to effectively permit the integration of contradictory oral representations into the terms of the parties' written agreement.

Finally, Greenwald attempts to circumvent the operation of the merger clause by arguing that he is entitled to rescind the Subscription Agreement. In line with the Court's holding in a related case, see Order in Hawk et al. v. Odom, No. 2009cv162588 (Superior Court of Fulton County July 10, 2009) (Long, J.), the remedy of rescission is not available here where the defendants are not parties to the Subscription Agreement, which was entered into between Greenwald and Verso only.

**Omissions in the Offering Documents:**

There is no dispute that the Offering Documents do not contain material misrepresentations of fact. But Greenwald contends that the Offering Documents omit certain information that renders the materials misleading and false. Because Kidder assisted Verso's in-house counsel in the preparation of the Offering Documents, with input from Odom, Greenwald contends that they are responsible for the alleged omissions contained therein. In particular, Greenwald argues that the Offering Documents fail to disclose that Verso faced an imminent threat of insolvency and that Verso was at risk of losing its NASDAQ listing because of a failure to meet the minimum shareholders' equity requirement.

In fact, the risk factors contained in the Offering Documents contain disclosures, which include that Verso has “a history of losses and may not be profitable in the future” and that Verso’s “operations...are dependent on the Company’s ability to secure additional financing; and...there are no existing arrangements with respect to that financing.” Moreover, the Offering Documents expressly warn of the possibility and consequences of NASDAQ delisting. And the risk factors identify the only notice Verso received from NASDAQ concerning its failure to comply with the exchange’s listing requirements. Given the degree to which the risk factors address Greenwald’s concerns, the Court tends to agree with Greenwald’s own conclusion when asked in his deposition what additional risks he would add to the Offering Documents: “I probably wouldn’t have said anything more.”

In any case, Greenwald’s claims of fraud by omission fail for the reason that he has not established that any defendant had a duty to speak. Actionable fraud may be based on “[s]uppression of a material fact which a party is under an obligation to communicate.” O.C.G.A. 23-2-53. “The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.” *Id.* There is nothing in the record to show that Greenwald shared a confidential relationship with Odom or Kidder. “Absent a confidential relationship, no duty to disclose exists between parties in arms-length business transactions.” *Lilliston v. Regions Bank*, 288 Ga. App. 241, 244 (2007). The record reveals that this case arises from an arms-length business transaction. As Odom and Kidder had no duty to disclose, Greenwald’s fraud by omission claims fail as a matter of law.

Defendants’ Motion for Summary Judgment is hereby GRANTED.

**SO ORDERED** this 9<sup>th</sup> day of February, 2011.

For   
ELIZABETH E. LONG, SENIOR JUDGE  
Superior Court of Fulton County  
Atlanta Judicial Circuit

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STATE OF GEORGIA

E.K. GREENWALD,

Plaintiff,

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STEVEN A. ODOM, MARTIN KIDDER,  
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